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IN THE

Supreme Court of the United States

ERICK DANIEL DAVILA,

Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE AMERICAN CIVIL LIBERTIES UNION AS AMICI CURIAE IN SUPPORT OF PETTTIONER

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in ensuring that defendants have a meaningful opportunity for review of substantial claims of ineffective assistance of counsel.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than one million members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Texas is one of its statewide affiliates. The ACLU and ACLU of Texas respectfully

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[1] No counsel for a party authored this brief in whole or in part. No person other than amicus or its counsel made a monetary contribution to this brief's preparation or submission. Letters consenting to the filing of this brief are on file with the Clerk.

submit this brief to assist the Court in resolving whether, in this death-penalty case, procedural default of an ineffective-assistance-of-counsel claim may be excused when the cause of the default is initial-collateral review counsel's own ineffectiveness. Given its longstanding interest in the protections contained in the Constitution, including in the Sixth, Eighth, and Fourteenth Amendments, the questions before the Court are of substantial importance to the ACLU, its Texas affiliate, and its members.

SUMMARY OF ARGUMENT

In *Martinez* v. *Ryan*, 566 U.S. 1 (2012), this Court made the equitable judgment that ineffective assistance of counsel at an initial-review collateral proceeding may constitute cause to excuse a procedural default of a substantial claim of ineffective assistance of trial counsel. This case presents the question whether *Martinez*'s equitable exception applies where the underlying claim asserts ineffective assistance of appellate counsel. The Court should hold that it does.

The considerations that led this Court to adopt the equitable exception in *Martinez* apply with equal force to a claim of ineffective assistance on appeal and warrant the same equitable judgment.

First, as in *Martinez*, the right to effective assistance of counsel on direct appeal is critically important to ensuring the fairness of a criminal proceeding. 566 U.S. at 12. Reversible errors occur frequently in criminal trials—particularly in capital cases—and direct review is the defendant's first and often best opportunity to obtain a remedy. But as in a criminal trial, effective representation is necessary to navigate the appellate process and to ensure that the state-court appeal

serves its proper function as the principal forum for adjudicating claims of error. Second, as in *Martinez*, a claim of ineffective assistance of appellate counsel cannot be raised on direct appeal, and prisoners are ill equipped to present that claim on collateral review without the effective assistance of counsel. *Id.* at 11-12. Attorney error in the initial-review collateral proceeding thus denies the defendant the opportunity to comply with state procedures and obtain adjudication on the merits of a claim involving ineffectiveness of appellate counsel, just as it does when the claim concerns the ineffectiveness of trial counsel. Finally, as in *Martinez*, treating the procedural default of an ineffective-assistance-of-appellate-counsel claim as a bar to federal habeas review will categorically foreclose any opportunity for review of the claim. "[I]f counsel's errors in an initial review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review" the claim, no matter how meritorious. *Id.* at 10-11.

The Court should hold that a federal habeas court may excuse the procedural default of a substantial claim of ineffective assistance of appellate counsel when the default arises from attorney error in an initial-review collateral proceeding.

ARGUMENT

INEFFECTIVE ASSISTANCE OF COUNSEL IN AN INITIAL-REVIEW COLLATERAL PROCEEDING SHOULD EXCUSE THE DEFAULT OF A SUBSTANTIAL INEFFECTIVE-ASSISTANCE-OF-APPELLATE-COUNSEL CLAIM

The rules that govern when a state prisoner may establish cause to excuse a procedural default are developed "in the exercise of the Court's discretion." *Martinez* v. *Ryan*, 566 U.S. 1, 13 (2012). In fashioning

those rules, the Court has consistently sought to balance concerns of finality, comity, and federalism against the importance of the writ of habeas corpus as a "'bulwark against convictions that violate fundamental fairness.'" *Coleman* v. *Thompson*, 501 U.S. 722, 747-748 (1991) (quoting *Engle* v. *Isaac*, 456 U.S. 107, 126 (1982)); *see Trevino* v. *Thaler*, 133 S. Ct. 1911, 1916-1917 (2013). In some instances, a state prisoner will have "deprived the state courts of an opportunity to address [his federal] claims in the first instance" by "fail[ing] to meet the State's procedural requirements." *Coleman*, 501 U.S. at 732. The procedural-default doctrine would typically bar a federal habeas court from reviewing such claims. *Id.* at 731-732. But "where a prisoner [has been] impeded or obstructed in complying with a State's established procedures," this Court has made the "equitable judgment" that the prisoner may be excused from the usual sanction of default. *Martinez*, 566 U.S. at 13.

Applying those principles in *Martinez*, the Court held that where state law formally precludes defendants from raising ineffective-assistance-of-trial-counsel claims on direct appeal, the ineffective assistance of counsel at the "initial-review collateral proceeding"—*i.e.*, "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial"—can constitute cause to excuse the default of a substantial trial-ineffectiveness claim. 566 U.S. at 8-14; *see Buck* v. *Davis*, 2017 WL 685534, at *9 (U.S. Feb. 22, 2017). That holding rested on three main considerations. First, if attorney error in the initial-review collateral proceeding could not excuse the default, then most likely no court would ever review the defendant's claims. *Martinez*, 566 U.S. at 10-11. Second, as on direct appeal, the court in the initial-review collateral

proceeding considers the merits of the underlying ineffective-assistance claim for the first time, and prisoners are often ill equipped to present their own claims without effective representation. *Id.* at 11-12. Third, "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system," raising a "particular concern" when the defaulted claim is "one of ineffective assistance of counsel." *Id.* at 12. In light of these considerations, the Court concluded that "the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not [be] sufficient to ensure that proper consideration [i]s given to a substantial claim." *Id.* at 14. The Court therefore held "as an equitable matter" that procedural default caused by counsel's ineffectiveness in the initial-review collateral proceeding "will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial." *Id.* at 14, 17; *see Trevino*, 133 S. Ct. at 1917-1918.

In *Trevino*, the Court considered whether the exception recognized in *Martinez* should apply also in States, like Texas, where state law effectively (even if not formally) denies most defendants a meaningful opportunity to present such claims on direct appeal. 133 S. Ct. at 1921; *see Buck*, 2017 WL 685534, at *9. Because it was "virtually impossible" for defendants to present ineffective-assistance-of-trial-counsel claims on direct appeal in light of Texas's procedural rules and the "inherent nature" of most ineffective-assistance claims, 133 S. Ct. at 1918 (internal quotation marks omitted), the Court concluded that the exception in *Martinez* ought to apply as well in Texas cases, *id.* at 1921. As in *Martinez*, the Court emphasized the critical importance of the right involved, the practical considerations favoring litigation of the claim on collateral re-

view, and the fact that applying the procedural-default bar would "deprive the defendant of any opportunity at all for review" of the underlying claim. *Id.*

The analysis in *Martinez* and *Trevino* dictates the outcome here. As set forth below, the factors that led the Court to recognize an exception to procedural default in *Martinez* and *Trevino* are equally weighty where a state prisoner seeks to vindicate a substantial claim of ineffective assistance of appellate counsel.

A. The Right To Effective Appellate Counsel Is Critically Important To The Fair Administration Of Criminal Justice

Central to *Martinez*'s reasoning was the Court's recognition that "[t]he right to effective assistance of counsel at trial is a bedrock principle in our justice system." 566 U.S. at 12. Observing that "[a] prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel," the Court reiterated the "obvious truth"—crystallized in *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963)—that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Martinez*, 566 U.S. at 12 (internal quotation marks omitted). The right to counsel is "the foundation of our adversary system," for "[d]efense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged." *Id.* And counsel must "preserve[] claims to be considered on appeal ... and in federal habeas proceedings." *Id.*

The right to effective appellate counsel is no less foundational. This Court has long held that an indigent criminal defendant is constitutionally entitled to ap-

pointment of counsel in the first direct appeal as of right. *Douglas* v. *California*, 372 U.S. 353 (1963). And a criminal proceeding does not satisfy due process if counsel provides ineffective assistance in that appeal. *Evitts* v. *Lucey*, 469 U.S. 387 (1985).

In so holding, the Court has repeatedly recognized parallels between trial and direct appeal and the critical need in both proceedings for effective assistance of counsel. Just as the Court in *Martinez* emphasized the dangers of proceeding without counsel at trial, 566 U.S. at 12, the Court in *Evitts* focused on the perils of navigating the direct appeal without effective counsel, *see Evitts*, 469 U.S. at 396. "In bringing an appeal as of right from conviction," the Court noted, "a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful." *Evitts*, 469 U.S. at 396. To do so, however, "a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding." *Id.* Thus, "[a]n unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake." *Id.* And "the promise of *Douglas* that a criminal defendant has a right to counsel on appeal—like the promise of *Gideon* that a criminal defendant has a right to counsel at trial—would be a futile gesture unless it comprehended the right to the effective assistance of counsel." *Id.* at 397; *see also Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956) (plurality) ("There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate ap-

pellate review accorded to all who have money enough to pay the costs in advance.").[2]

The right to effective appellate counsel is particularly important in light of the critical role the direct appeal plays in criminal cases. Direct review in the state appellate court is the defendant's first and often best opportunity to obtain relief when errors occur in a criminal trial—as they frequently do. As the plurality observed in *Griffin*, "a substantial proportion of criminal convictions are reversed by state appellate courts." 351 U.S. at 18-19 (citing Note, *Reversals in Illinois Criminal Cases*, 42 Harv. L. Rev. 566 (1929)).

That remains true today. A 2015 Department of Justice study found that state intermediate appellate courts reversed judgments on the merits in 15.1 percent of non-capital felony direct appeals in 2010 and 14.8 percent of misdemeanor direct appeals in the same year. *See* Bureau of Justice Statistics, U.S. Dep't of Justice,

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[2] *See also Ha Van Nguyen* v. *Curry*, 736 F.3d 1287, 1294 (9th Cir. 2013) ("There is nothing in our jurisprudence to suggest that the Sixth Amendment right to effective counsel is weaker or less important for appellate counsel than for trial counsel."); *Goodwin* v. *Johnson*, 132 F.3d 162, 174 (5th Cir. 1997) ("[T]he right to effective assistance of counsel, both at the trial and appellate level, is recognized not for its own sake, but because of the effect that it has on the ability of the accused to receive a fair trial." (internal quotation marks omitted)). Courts apply the same standard under *Strickland* v. *Washington*, 466 U.S. 668 (1984), to adjudicate both appellate-ineffectiveness and trial-ineffectiveness claims. *See, e.g.*, *Blanton* v. *Quarterman*, 543 F.3d 230, 235 (5th Cir. 2008); *Aparicio* v. *Artuz*, 269 F.3d 78, 95 (2d Cir. 2001); *Bell* v. *Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000) (en banc); *Buehl* v. *Vaughn*, 166 F.3d 163, 173-174 (3d Cir. 1999); *Benvenuto* v. *State*, 165 P.3d 1195, 1202-1203 (Utah 2007); *Jones* v. *State*, 816 So. 2d 1067, 1071 (Ala. Crim. App. 2000), *overruled on other grounds*, *Brown* v. *State*, 903 So. 2d 159, 162-163 (Ala. Crim. App. 2004); *People* v. *Valdez*, 789 P.2d 406, 411 (Colo. 1990) (en banc).

Criminal Appeals in State Courts, at 5, tbl. 2 (Sept. 2015) (*State Criminal Appeals 2015 Study*), *available at* https://www.bjs.gov/content/pub/pdf/casc.pdf. The rate was even higher in capital cases: State intermediate appellate courts considering direct appeals as of right in 2010 reversed in 30 percent of death-penalty cases. *Id.*; *see also id.* at 4, tbl. 1 (showing that state courts of last resort reversed on the merits in 18.6 percent of death-penalty cases).

Longitudinal studies confirm that reversible error occurs in a substantial portion of state capital trials, underscoring the importance of effective representation on appeal to ensuring the fairness of criminal proceedings, *Martinez*, 566 U.S. at 12. A 2000 study found that, of the approximately 5,760 death sentences imposed in the United States between 1973 and 1995, approximately 4,578 were reviewed on direct appeal, and state appellate courts vacated the judgment in approximately 1,885 cases—*i.e.*, 41 percent of direct appeals—on the basis of "serious error[s]" that "substantially undermine[d] the reliability of the outcome." *See* Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 Tex. L. Rev. 1839, 1846-1847 (2000) (*Liebman Study*).[3] Of all defendants whose death sentences were overturned at any stage of review during the study period, 82 percent were found on retrial not to have deserved the death penalty, and 7 percent were cleared altogether of the capital offense. *Id.* at 1852.

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[3] The study counted only those errors that were discovered and properly preserved, were found by a court to have been prejudicial, and resulted in reversal of a capital conviction or sentence. *Liebman Study* 1847 n.29; *see also* Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, at 5 (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf.

A 2014 Department of Justice study similarly found that the conviction or sentence was overturned at some stage of review in 2,671 of the 8,466 cases in which a death sentence was imposed in the United States between 1973 and 2013—*i.e.*, approximately 31.5 percent of death-penalty cases. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment, 2013 – Statistical Tables*, at 19, tbl. 16 (Dec. 19, 2014) (*Capital Punishment 2014 Study*), *available at* https://www.bjs.gov/content/pub/pdf/cp13st.pdf.[4] That figure

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[4] State-by-state reversal rates in capital cases, including reversals based on invalidation of the capital-punishment statute, were as follows: Alabama, 155 out of 439 (35%); Arizona, 120 out of 307 (39%); Arkansas, 45 out of 114 (39%); California, 158 out of 1,013 (16%); Colorado, 15 out of 22 (68%); Connecticut, 4 out of 15 (27%); Delaware, 26 out of 60 (43%); Florida, 469 out of 1,040 (45%); Georgia, 160 out of 325 (49%); Idaho, 21 out of 42 (50%); Illinois, 97 out of 307 (32%); Indiana, 57 out of 103 (55%); Kansas, 4 out of 13 (31%); Kentucky, 39 out of 83 (47%); Louisiana, 119 out of 245 (49%); Maryland, 36 out of 53 (68%); Massachusetts, 2 out of 4 (50%); Mississippi, 117 out of 197 (59%); Missouri, 57 out of 186 (31%); Montana, 6 out of 15 (40%); Nebraska, 12 out of 33 (36%); Nevada, 44 out of 156 (28%); New Hampshire, 0 out of 1 (0%); New Jersey, 33 out of 52 (63%); New Mexico, 19 out of 28 (68%); New York, 10 out of 10 (100%); North Carolina, 309 out of 536 (58%); Ohio, 183 out of 419 (44%); Oklahoma, 176 out of 353 (50%); Oregon, 24 out of 63 (38%); Pennsylvania, 188 out of 417 (45%); Rhode Island, 2 out of 2 (100%); South Carolina, 105 out of 204 (51%); South Dakota, 0 out of 7 (0%); Tennessee, 117 out of 225 (52%); Texas, 194 out of 1,075 (18%); Utah, 10 out of 27 (37%); Virginia, 17 out of 152 (11%); Washington, 25 out of 40 (63%); Wyoming, 9 out of 12 (75%). *See Capital Punishment 2014 Study*, at 20, tbl. 17. For state-specific studies, see, *e.g.*, Baumgartner & Lyman, *Louisiana Death-Sentenced Cases and Their Reversals, 1976-2015*, 7 J. of Race, Gender & Poverty 58, 67-68 (2016); Baumgartner, *Rates of Reversals in the North Carolina Death Penalty*, The University of North Carolina at Chapel Hill (Mar. 22, 2010), *available at* https://www.unc.edu/~fbaum/Innocence/NC/Baumgartner_NC_Death_Reversals-March-20-2010.pdf.

does not include reversals based on invalidation of the State's capital-punishment statute. *Id.*

Direct appeal thus serves a critical function in criminal cases, particularly in capital cases. Where appellate counsel provides constitutionally ineffective assistance, many defendants may indeed "lose their life, liberty or property because of unjust convictions which appellate courts would [have] set aside" but for counsel's errors. *Griffin*, 351 U.S. at 19 (plurality). To be sure, not all errors are corrected on direct review; many capital convictions and sentences that survive direct appeal are later vacated in state or federal collateral proceedings. *See Liebman Study* 1852.[5] But as these studies demonstrate, direct appeal in state court nonetheless provides an important opportunity for defendants to obtain relief for (or at least preserve) the errors that frequently occur in capital trials.

This Court has accordingly recognized the central role of direct appeal in state court as an important bulwark against arbitrary imposition of capital sentences. In *Jurek* v. *Texas*, 428 U.S. 262 (1976), for instance, this Court upheld Texas's capital-sentencing scheme in part because Texas law provided for direct appeal as of right.[6] The Court emphasized that "prompt judicial re-

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[5] Of all death sentences imposed between 1973 and 1995 that survived direct review, 10 percent were overturned in state post-conviction proceedings. *Liebman Study* 1852. Forty percent of the cases that survived both direct review and state post-conviction review were overturned on federal habeas review during the study period, which preceded enactment of the Antiterrorism and Effective Death Penalty Act. *Id.*

[6] Texas law provides that "[t]he judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals." Tex. Crim. Proc. Code Ann. art. 37.071 § 2(h); *see also Pondexter* v. *State*, 942 S.W.2d 577, 588 (Tex.

view" on appeal was critical to "promot[ing] the even-handed, rational, and consistent imposition of death sentences under law." *Id.* at 276 (plurality); *see also Gregg* v. *Georgia*, 428 U.S. 153, 198 (1976) (approving Georgia's capital-sentencing scheme in part because it provided for "automatic appeal of all death sentences to the State's Supreme Court").

Federal habeas principles similarly rest on the understanding that, in our federal system, state appellate courts have the first and often best opportunity to review claims of error and provide any needed relief. *See, e.g.*, *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011) ("state courts are the principal forum for asserting constitutional challenges to state convictions"); *Duncan* v. *Walker*, 533 U.S. 167, 178-179 (2001) (exhaustion requirement ensures that "state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment"). Indeed, the procedural-default doctrine assumes that state courts "should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights." *Coleman*, 501 U.S. at 731.

Effective representation of defendants on direct appeal is necessary to state courts' fulfillment of their principal role in administering criminal justice. "Navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson," *Halbert* v. *Michigan*, 545 U.S. 605, 621 (2005), and "the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits," *Evitts*, 469 U.S. at 393. Ac-

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Crim. App. 1996) (Texas's direct review is "a safeguard to ensure that the death penalty is not arbitrarily or irrationally imposed").

cordingly, "[a] first appeal as of right ... is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Id.* Where appellate counsel renders constitutionally ineffective assistance, "counsel's unprofessional errors so upset the adversarial balance between defense and prosecution," *Kimmelman* v. *Morrison*, 477 U.S. 365, 374 (1986), that the appeal cannot be relied on to ensure the fairness of the judgment. The right to effective assistance of counsel on direct appeal is thus just as fundamental to our adversary system as the right to effective assistance of counsel at trial—and critically important to resolving errors in capital proceedings. *See Martinez*, 566 U.S. at 12.

B. Defendants Cannot Raise Ineffective Assistance Of Appellate Counsel On Direct Appeal And Are Ill Equipped To Present That Claim On Collateral Review Without Counsel's Assistance

As a second basis for adopting the equitable exception, the Court noted in *Martinez* that an initial-review collateral proceeding "is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim," where counsel's errors can provide cause to excuse a procedural default. 566 U.S. at 11; *see also Trevino*, 133 S. Ct. at 1917. In particular, just as in a direct appeal, the initial-review collateral proceeding "'looks to the merits'" of the underlying claim, no other court has addressed the claim, and "'defendants pursuing first-tier review ... are generally ill equipped to represent themselves.'" *Martinez*, 566 U.S. at 11 (quoting *Halbert*, 545 U.S. at 617).

The initial-review collateral proceeding bears those same characteristics when the claim is one of ineffec-

tive assistance of appellate counsel. As in *Martinez* and *Trevino*, that proceeding is generally the first opportunity to obtain adjudication on the merits of an ineffective-assistance-of-appellate-counsel claim. By definition, the lawyer whose effectiveness on appeal is at issue cannot, during the course of the appeal, challenge his own performance as a basis for relief. *See Ha Van Nguyen* v. *Curry*, 736 F.3d 1287, 1294-1295 (9th Cir. 2013). Rather, the claim must await the appropriate collateral proceeding for resolution on the merits. Without adequate counsel in that proceeding, however, a defendant "will have ... difficulties vindicating [even] a substantial ... claim." *Martinez*, 566 U.S. at 11.

Those difficulties include navigating what one court has described as the "legal maze" of state collateral proceedings, *Pauley* v. *Ryan*, 2013 WL 663606, at *3 (D. Ariz. Jan. 22, 2013). A prisoner, "unlearned in the law," might not understand how to comply with the State's procedural rules, *Martinez*, 566 U.S. at 12; *see also, e.g.*, *Poaches* v. *Camaron*, 2015 WL 1725768, at *6 (E.D. Pa. Apr. 15, 2015) ("incarcerated *pro se* petitioners attempting to navigate the complex federal and state schema for collaterally attacking convictions" face "unfortunate ... difficulties"). For example, a prisoner asserting an ineffective-assistance-of-appellate-counsel claim must first identify the proper venue and procedural vehicle for presenting the claim. In some jurisdictions, such a claim must be raised on collateral attack in the court that heard the direct appeal, through a motion to recall the mandate, a petition for a writ of habeas corpus or writ of coram nobis, or similar filing; other jurisdictions require the prisoner to seek relief in the convicting trial court. *See, e.g.*, *State* v. *Knight*, 484 N.W.2d 540, 542-544 (Wis. 1992) (describing various procedures).

In Texas, a prisoner may seek a new direct appeal, on the ground that his appellate counsel provided ineffective assistance, by applying for a writ of habeas corpus in the convicting trial court.[7] But that procedure is complicated in capital cases by Texas's dual-track review system, which ordinarily requires a death-sentenced prisoner to initiate state post-conviction proceedings concurrently with the direct appeal. *See* 43B Dix & Schmolesky, *Texas Practice: Criminal Practice and Procedure* § 58:64 (3d ed. 2011); Tex. Code Crim. Proc. Ann. art. 11.071 § 4(a) (requiring filing of habeas application within 180 days after counsel's appointment or 45 days after State files its brief on direct appeal, whichever is later); Tex. Code Crim. Proc. Ann. art. 11.071 § 2(c) (requiring appointment of state habeas counsel "[a]t the earliest practical time" after imposition of a death sentence, but no later than 30 days after the court finds the defendant indigent). Because of those requirements, the prisoner must often file his habeas application before the Texas Court of Criminal Appeals has decided the case on direct appeal.[8] That requirement can make it very difficult to present an in-

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[7] *See, e.g., Ex parte Miller*, 330 S.W.3d 610, 622-626 (Tex. Crim. App. 2009) (granting new appeal where appellate counsel failed to challenge sufficiency of evidence supporting sentence; "[a]ny objectively reasonable attorney would have been familiar with the well-settled law" concerning sentence enhancements and "would have raised this 'sure-fire winner' claim"); *Ex parte Green*, 2016 WL 1534000, at *1 (Tex. Crim. App. Apr. 13, 2016) (per curiam) (granting new appeal where appellate counsel's failure to challenge cumulation order was deficient and prejudicial).

[8] In this case, the Court of Criminal Appeals issued its opinion affirming Mr. Davila's conviction and sentence months before his habeas petition was filed—but only because his habeas counsel missed the filing deadline. Pet. Br. 8. The petition still failed to raise any ineffective-assistance-of-appellate-counsel claim. *Id.*

effective-assistance-of-appellate-counsel claim even in state habeas proceedings in Texas. *See, e.g.*, American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report* 217 (Sept. 2013).

Establishing the substantive merit of a claim of ineffective assistance of appellate counsel likewise requires effective counsel. Prevailing on such a claim requires an understanding not only of the "substantive details of federal constitutional law," but also of litigation strategy. *Martinez*, 566 U.S. at 11-12; *see, e.g.*, *Pruett* v. *Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993) ("A decision with respect to an appeal is entitled to the same presumption that protects sound trial strategy."). For example, a prisoner ordinarily must show that appellate counsel had no reasonable strategic justification for omitting a particular argument on direct appeal—a uniquely difficult argument for a layperson to craft, especially an indigent layperson confined to prison.[9] And as was true in *Martinez* with respect to ineffective assistance of trial counsel, a prisoner seeking relief for ineffective assistance of appellate counsel will not have the benefit of any prior court decision or attorney ar-

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[9] *See, e.g.*, *Ex parte McCuin*, 492 S.W.3d 733, 737 (Tex. Crim. App. 2016) (Alcala, J., dissenting from denial of habeas relief) ("Despite the apparent existence of a likely meritorious ineffective-assistance-of-appellate-counsel claim, applicant's *pro se* pleadings fail to expressly present that legal theory as a basis for granting relief, instead focusing on complaints regarding trial counsel's performance. ... [T]his oversight is perhaps understandable, given that a claim of ineffective assistance of appellate counsel is complex and involves an understanding of trial error, concepts of preservation of error, and appellate strategy. It should go without saying that such concepts are not likely to come intuitively to a *pro se* litigant untrained in the law.").

gument on the adequacy of appellate counsel. *Martinez*, 566 U.S. at 11-12; *see also Halbert*, 545 U.S. at 607.

In observing that *Martinez* did not address claims of ineffective assistance of appellate counsel, one court of appeals—in a case decided before *Trevino*—noted this Court's observation in *Martinez* that Arizona had "deliberately cho[sen]" to channel ineffective-assistance-of-trial-counsel claims away from direct appeal, where counsel is constitutionally guaranteed, to a proceeding where the prisoner has a comparatively "diminishe[d] ... ability" to present the claim, 566 U.S. at 13; *see Banks* v. *Workman*, 692 F.3d 1133, 1147-1148 (10th Cir. 2012). No precise analogue to that deliberate relocation occurs here, since a claim of appellate ineffectiveness cannot be brought on direct appeal. But *Trevino* rejected the argument that the *Martinez* exception hinges on the State's formal channeling of claims to collateral proceedings, deeming it a "distinction without a difference" whether the State formally precludes defendants from raising a claim on appeal that could otherwise have been brought there or whether the nature of the claim and the State's procedural system simply make review on direct appeal virtually impossible as a practical matter. *Trevino*, 133 S. Ct. at 1921; *see also Buck*, 2017 WL 685534, at *9; *cf. Trevino*, 133 S. Ct. at 1922 (Roberts, C.J., dissenting) (*Martinez*'s equitable exception should apply only where the State makes a "clear choice" formally to move trial-ineffectiveness claims outside of the direct-appeal process). What matters instead is whether—because of the nature of the claims and the state procedural system—the prisoner has been "impeded or obstructed in complying with the State's established procedures" in the first proceeding where review could have been obtained. *Martinez*, 566 U.S. at 13-14; *Trevi-*

no, 133 S. Ct. at 1918-1921. And when the attorney representing the prisoner in an initial-review collateral proceeding does not competently present an ineffective-assistance-of-appellate-counsel claim, the prisoner is "denied ... the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claim," *Martinez*, 566 U.S. at 11, no less than when the claim concerns ineffective assistance of trial counsel.

C. Unless *Martinez* Applies To Appellate-Ineffectiveness Claims, Attorney Error In The Initial-Review Collateral Proceeding Will Likely Deprive The Prisoner Of Any Opportunity For Review

Finally, in *Martinez*, this Court recognized that "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." 566 U.S. at 10-11. This marked a "key difference" from *Coleman*, where the attorney errors that the prisoner invoked as cause occurred on appeal from the initial-review collateral proceeding. *Id.* at 10. Treating the prisoner's claims as barred in *Coleman* did not deprive him of a meaningful opportunity for review, because his claims "had been addressed by the state habeas trial court." *Id.*; *see also Coleman*, 501 U.S. at 755 ("[w]e need not answer th[e] question broadly" whether procedural default should apply "where state collateral review is the first place a prisoner can present a challenge to his conviction," because "one state court has addressed Coleman's claims: the state habeas trial court"). In contrast, when the error occurs in the initial-review collateral proceeding

itself, "it is likely that no state court at any level will hear the prisoner's claim." *Martinez*, 566 U.S. at 10.[10]

That rationale brooks no distinction between claims of trial ineffectiveness and claims of appellate ineffectiveness—both of which seek to vindicate constitutional rights essential to the administration of justice. As to either claim, a defendant who has a constitutionally ineffective attorney in the initial-review collateral proceeding will face the same fundamental unfairness without the *Martinez* exception: "[F]ailure to consider a lawyer's 'ineffectiveness' during an initial-review collateral proceeding as a potential 'cause' for excusing a procedural default will deprive the defendant of any opportunity at all for review." *Trevino*, 133 S. Ct. at 1921; *see also Ha Van Nguyen*, 736 F.3d at 1294-1296.

These circumstances yield the same "equitable judgment" as in *Martinez*: Allowing a federal habeas court to hear an ineffective-assistance claim "when an attorney's errors ... caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim." 566 U.S. at 13-14.

As applied to ineffective assistance of appellate counsel, that equitable principle remains subject to the

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[10] The petitioner in *Coleman* sought to raise both trial-ineffectiveness and appellate-ineffectiveness claims. *See* 501 U.S. at 755. In distinguishing *Coleman*, the Court in *Martinez* nowhere relied on the fact that Coleman's case included an appellate-ineffectiveness claim, instead emphasizing that "Coleman ... did not involve an occasion when an attorney erred in an initial-review collateral proceeding." 566 U.S. at 15.

same limitations the Court identified in *Martinez* and *Trevino*. To invoke the exception, the prisoner must show that the ineffective-assistance-of-appellate-counsel claim is "substantial"—*i.e.*, that it has "some merit." *Martinez*, 566 U.S. at 14; *see also Buck*, 2017 WL 685534, at *9. And the prisoner must show either that the state courts did not appoint counsel in the initial-review collateral proceeding, or that appointed counsel was ineffective under the standards of *Strickland* v. *Washington*, 466 U.S. 668 (1984). *See Martinez*, 566 U.S. at 14. Attorney errors that do not rise to that level, or that occur in any proceeding beyond the first occasion for raising the claim, do not suffice. *Id.* at 14, 16. Moreover, applying the *Martinez* exception to appellate-ineffectiveness claims preserves the flexibility the Court left to States by adopting an equitable exception rather than a constitutional ruling. *Id.* at 16.

The outcome here thus follows directly from *Martinez*, which struck an appropriate equitable balance between the interests in "prevent[ing] federal courts from interfering with a State's application of its own firmly established, consistently followed, constitutionally proper procedural rules" and preserving "the historic importance of federal habeas corpus proceedings" in ensuring that a substantial claim of a violation of the prisoner's right to effective assistance of counsel does not go unreviewed. *Trevino*, 133 S. Ct. at 1916-1917; *see Martinez*, 566 U.S. at 9-14.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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